DORIS A. SLAATEN ET AL.

IBLA 84-214 Decided June 12, 1984

Appeal from decision of Montana State Office, Bureau of Land Management, terminating mineral reservation and directing payment of future royalties into escrow account.

Set aside and remanded.

1. Mineral Lands: Mineral Reservation -- Public Lands: Jurisdiction Over

BLM has the jurisdiction to determine whether the terms of a mineral reservation in a deed to the United States has operated to vest title to the mineral estate in the United States by virtue of a failure to comply with an annual production requirement found in the reservation. However, where the record indicates that BLM has not fully considered whether production within a production unit which includes the reserved land serves to extend the reservation, the case will be remanded to BLM for consideration of that question.

APPEARANCES: Doris A. Slaaten, pro se; Marvin G. Twenhafel, Esq., Denver, Colorado, for appellant, Texaco, Inc.; Jonathan C. Eaton, Jr., Esq., Minot, North Dakota, for appellant, Estate of C. F. Brehm; Yvonne L. Schultz, pro se.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Doris A. Slaaten and others 1/ have appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), dated November 22, 1983, terminating a mineral reservation contained in a deed of land to the United States and directing the payment of future royalties into an escrow account.

By warranty deed executed by Maude L. Slaaten and Alfred Slaaten, dated May 25, 1937, the United States acquired approximately 160 acres of land situated in the NW 1/4 sec. 17, T. 153 N., R. 95 W., fifth principal

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1/ Those who filed appeals are Doris A. Slaaten, Texaco, Inc. (Texaco), the Estate of C. E. Brehm and Yvonne L. Schultz. Texaco is the holder of an oil and gas lease for 480 acres of land, including the land involved herein, originally issued by Maude L. Slaaten on Apr. 28, 1948, and subsequently transferred to Texaco on Nov. 1, 1948. The other appellants are among the holders of certain royalty interests in that private lease.

meridian, McKenzie County, North Dakota. The deed reserved to the grantors the "exclusive right to prospect for and exploit" the oil and gas reserves of the subject land, which right was to expire on November 4, 1961. The deed, however, provided for extensions of the reserved mineral right under certain conditions:

> The right herein reserved shall automatically be extended for a period of five years, upon the termination of said right, and for successive periods of five years each, upon the expiration of each next preceding extension thereof, provided that the duly authorized official in charge of the Conservation Area shall determine, prior to the expiration of any such period, that the Seller has mined minerals in the exercise of said right to commercial advantage for an average of at least two hundred (200) days per year during each year of the next preceding period. In the event of the first extension of said right, its exercise by Seller shall be limited to an area of twenty-five (25) acres of land around each well or mine producing, or being drilled or developed at the time of termination of said right. In the event of any subsequent extension of said right, its exercise by Seller shall be limited to an area of twenty-five (25) acres of land around each well or mine producing at the time of the termination of the next preceding extension of said right. Otherwise, if such minerals have not been mined to commercial advantage for an average of at least two hundred (200) days per year during the preceding five (5) year period, the right extended shall absolutely terminate.
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> The right herein reserved is subject to the terms, conditions and limitations set out below:
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> * * * * * *
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> 2. Seller shall notify the duly authorized official in charge of the Conservation Area of his intention to exercise said right one (1) month in advance of such exercise and shall, before he commences operations, furnish and maintain hereafter during the exercise of said right a bond with a qualified corporate surety, conditioned upon compliance by the vendor with the provisions herein enumerated, and in terms and amount meeting the approval of said official.

In its November 1983 decision, BLM terminated the mineral reservation contained in the 1937 warranty deed, concluding that the grantor had failed to comply with either or both of the conditions precedent to an extension. BLM characterized these conditions precedent as follows:

> 1. The seller must notify the duly authorized official in charge of the Conservation Area of his intention to exercise the right of extension one month in advance of the termination date of any previous extension, and,
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> 2. Each well or mine must be producing at the time of termination of any extension, or, it must have produced an average of 200 days per year for the preceding five-year period.

BLM noted that two wells, the A-117 and the B-217, had been drilled within the NW 1/4 of sec. 17, and that these wells had produced until the second half of 1967 (A-117) and the end of January 1978 (B-217). In the case of the A-117 well, BLM held that it had not fulfilled the production requirement "for the first extension." In the case of the B-217 well, BLM held that it had fulfilled the requirement for an extension "until midnight on November 4, 1981." However, in both cases, BLM concluded that the failure to notify BLM of the intention to exercise the right of extension caused the mineral reservation as to the 25-acre sites around the wells to terminate effective "midnight on November 4, 1966," (i.e., after the first 5-year extension) and the mineral rights had passed to the United States. BLM also noted that the wells had been in the Charlson-Madison (North) unit "since its inception on June 1, 1966," but stated that BLM did "not believe" that unit production allocated to the NW 1/4 of sec. 17 fulfilled the production requirement. Finally, BLM held that all royalties paid since November 4, 1966, are "due to the United States of America" and directed that future royalties be paid into an escrow account "pending final settlement."

In its statement of reasons for appeal, Texaco contends that the Department lacks jurisdiction to construe the mineral reservation in the 1937 warranty deed to the United States because that is a matter for the courts and moves to dismiss the appeal. Texaco states that the United States should institute a quiet title action against the parties claiming a mineral interest in the land. In the alternative, Texaco contends that the Department is without authority to require that Texaco pay all future royalties into an escrow account and, thus, expose Texaco to liability to the holders of royalty interests in the private lease to Texaco. 2/ Moreover, Texaco argues that, by requiring payment of future royalties into an escrow account, the Department is abrogating certain agreements which are binding on the Department. Texaco cites an October 26, 1961 agreement (M-047493 (ND)) between the United States and Texaco "whereby the United States acknowledged that its mineral interest in the questioned lands (NW 1/4 of Section 17) is subject to the terms and provisions of the Maude L. Slaaten Lease to Texaco, Inc., and to the two communitization agreements therein recited" (Statement of Reasons at 2). The October 26, 1961 agreement also provided that Texaco would pay the United States compensatory royalty with respect to "all oil and gas that the United States claims or might claim has been or will be drained from the interest of the United States in said 160-acre tract," i.e., the NW 1/4 of sec. 17. Texaco also cites the May 31, 1966 Department approval of the June 1, 1966 Charlson-Madison (North) unit agreement, which includes the NW 1/4 of sec. 17 as a part of the unitized lands and acknowledges the 1961 compensatory royalty agreement between Texaco and the United States.

On appeal, Doris A. Slaaten contends that rights under the mineral reservation would "automatically" be extended with respect to 25 acres around the A-117 and B-217 wells provided only that the production requirement was met and that there has been "continuous" unit production, allocatable to these

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2/ Texaco notes that production "continues on a daily basis" with respect to the Charlson-Madison (North) Unit, which includes the NW 1/4 of sec. 17, and submits a graph depicting unit production from March 1953 to December 1982 (Statement of Reasons at 4). Texaco also states that it continues to pay royalties to the United States (see, infra) and the other royalty holders with respect to unit production.

wells. On appeal, Yvonne L. Schultz argues that she is entitled to royalties with respect to production from the NW 1/4 of sec. 17 and that for the United States to take such royalties would violate appellant's due process rights.

[1] The first question raised is whether the Department has jurisdiction to construe the mineral reservation in the 1937 warranty deed to the United States. By moving to dismiss the appeal, Texaco is essentially asserting that the United States does not have the authority to determine whether title to the mineral estate has passed to the United States pursuant to the terms of a reservation contained in a conveyance to the United States. We conclude that the Department does have authority to determine what are public lands, including authority to determine the extent of the public ownership of minerals in such public lands. It has long been recognized that the Department has such authority. See State of Montana, 11 IBLA 3, 80 I.D. 312 (1973); Burt A. Wackerli, 73 I.D. 280, 286 (1966), and cases cited therein. Moreover, on a number of occasions the Board has construed mineral reservations retained by the United States in patents to private parties. See, e.g., Renewable Energy, Inc., 67 IBLA 304, 89 I.D. 496 (1982); Texaco, Inc., 59 IBLA 155 (1981). Indeed, the Supreme Court, in Kirwan v. Murphy, 189 U.S. 35, 54 (1903), stated that

> the Land Department, charged with the duty of surveying the public domain, must primarily determine what are public lands subject to survey and disposal under the public land laws. Possessed of the power, in general, its exercise of jurisdiction cannot be questioned by the courts before it has taken final action. Brown v. Hitchcock, 173 U.S. 473 [(1899)].

Accordingly, we hold that the Department does have jurisdiction in the first instance to construe the mineral reservation in the 1937 warranty deed, with further recourse to the judicial system. We therefore deny Texaco's motion to dismiss.

The next question concerns the meaning of the mineral reservation in the 1937 warranty deed. BLM concludes that the reservation should impose two conditions precedent to extension of the grantor's mineral rights. One of these conditions is that the grantor notify the authorized official of an intention to exercise the "right of extension." We conclude that the reservation does not impose that condition. The "right" identified in the warranty deed is not the "right of extension," as BLM maintains. Rather, when the deed states that the grantor "shall notify the duly authorized official * * * of his intention to exercise said right one (1) month in advance of such exercise," the reference to a "right" refers to the exclusive right to prospect for and exploit the oil and gas reserves. Indeed, the same provision next refers to furnishing a bond prior to commencing operations. Moreover, we note that BLM has previously taken this same position. The record contains correspondence between the BLM state office and BLM, Washington, directed to this point. In a letter dated May 29, 1962, the Chief, Division of Minerals, BLM, informed the State Director, Montana, BLM, that he agreed with the State Director's conclusion when interpreting an identical mineral reservation:

> The provision in the reservation, to which you refer, regarding notice to the authorized official in charge of the conservation

> area by the seller "of his intention to exercise said right one (1) month in advance of such exercise * * *," has been correctly construed by you as pertaining only to the right to go on the lands to commence operations, and not to an extension of the mineral reservation.

Finally, the record contains a copy of the judgment in United States v. Amax Petroleum Corp., Civ. No. 712 (D.N.D., dated Oct. 16, 1967), at 3, wherein the district court construed the same mineral reservation contained in the Slaaten deed and discussed in the BLM correspondence, supra, holding that title remained in the grantor with respect to 25 acres around each producing well "so long as production is maintained to commercial advantage for an average of at least two hundred (200) days a year, as provided in the aforesaid mineral reservation." The court did not mention a notice requirement.

Therefore, we conclude that extension of the mineral reservation was only subject to the second condition precedent. BLM construes that condition to mean that a well must either be producing at the time of termination of the preceding 5-year extension or have produced an average of 200 days per year in that preceding period. We do not interpret the second condition precedent contained in the reservation in this manner. Rather, the reservation provides that entitlement to a 5-year extension depends on production to commercial advantage each year within the preceding 5-year period. In addition, the reservation provides that exercise of the right to prospect for and exploit the oil and gas reserves during any extension is "limited to an area of twenty-five (25) acres of land around each well or mine producing, or being drilled or developed at the time of termination of the next preceding extension of said right." Accordingly, the extension would only be applicable where the production requirement was met with respect to a particular well and that well was producing or being drilled or developed at the time the preceding extension expired.

In the present case, the two wells on the conveyed lands terminated production in the second half of 1967 (A-117) and the end of January 1978 (B-217). Therefore, the mineral reservation with respect to the A-117 well would have terminated on November 4, 1966, because the production requirement was not fulfilled between 1961 and 1966. The mineral reservation with respect to the B-217 well would have terminated on November 4, 1981, because the production requirement was not fulfilled between 1976 and 1981. However, unit production may be allocated to land within the unitized area for the purposes of extending the term of a mineral reservation pertaining to that land if the extension is dependent on production. Solicitor's Opinion, M-36632 (Nov. 3, 1961). The aforementioned Solicitor's opinion involved a mineral reservation in favor of the United States which was to continue for 20 years and "so long thereafter as oil, gas and/or other minerals or any of them are produced therefrom, or the premises are being developed or operated." Id. at 1. The reservation was deemed to be extended by reason of production within the unitized area, but not within the reserved land, because production anywhere within the unit was considered to be production from all of the lands within the unit. In the present case, section 10 of the unit agreement for the Charlson-Madison (North) Unit provides for the allocation of unit production to the various tracts of land within the unit, including the land involved herein. Thus, unit production can be allocated for purposes of complying with the terms of the mineral reservation.

In its November 1983 decision, BLM concluded that it did "not believe" that allocated production fulfilled the requirement of production to commercial advantage for 200 days per year of a particular 5-year period for each of the two wells. However, the record does not provide any information as to production within the Charlson-Madison (North) Unit during relevant time periods. On the other hand, Texaco submitted evidence on appeal that oil production within the unit has been continuous from March 1953 to December 1982 (although the monthly production has been declining since 1967). Accordingly, we conclude that the November 1983 BLM decision should be set aside and the case remanded to BLM in order to determine whether unit production has satisfied the production requirement of the mineral reservation contained in the 1937 warranty deed. If BLM determines that the requirement has been satisfied, then title to the mineral estate has not passed to the United States.

With respect to whether BLM is authorized to instruct Texaco to pay future royalties into an escrow account, we note that the effect of the decision has been stayed on appeal pending a final decision by the Board. 43 CFR 4.21(a). Moreover, as we hereby set aside the BLM decision and remand the case to BLM, we need not address the question at this time.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case is remanded to BLM for further action consistent herewith.

R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Edward W. Stuebing
Administrative Judge